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MEMORANDUM

July 24, 2013

To: Subcommittee on Communications and Technology Democratic Members and Staff

Fr: Committee on Energy and Commerce Democratic Staff

Re: Subcommittee Markup of H.R. __, the “Federal Communications Commission Process Reform Act of 2013” and H.R. __, the “Federal Communications Commission Consolidated Reporting Act of 2013”

On Wednesday, July 24, 2013, at 5:00 p.m. in room 2322 of the Rayburn House Office Building, the Subcommittee on Communications and Technology will conduct opening statements for the markup of two Republican discussion drafts: the “Federal Communications Commission Process Reform Act of 2013” and the “Federal Communications Commission Consolidated Reporting Act of 2013.” The Subcommittee will reconvene on Thursday, July 25, 2013, at 9:00 a.m. in room 2123 of the Rayburn House Office Building.

I. THE FEDERAL COMMUNICATIONS COMMISSION PROCESS REFORM ACT OF 2013

On July 8, 2013, Chairman Walden circulated a discussion draft of the Federal Communications Commission (FCC) Process Reform Act of 2013. This bill is based on H.R. 3309 from the 112th Congress, which most Democrats opposed because it would have significantly altered the FCC’s authority to protect consumers and competition in the communications marketplace.¹

¹ H.R. 3309 passed the House on March 27, 2012, by a vote of 247-174. The bill was not considered in the Senate.

The July 8 discussion draft incorporated the language from H.R. 3309 as well as three new provisions. First, for “economically significant” rules that will have an annual impact of over \$100 million on the economy, the discussion draft contained a new provision requiring the FCC to determine that changes in the market or technology will not resolve the issue the rule is meant to address “within a reasonable period of time.” Second, in the context of merger reviews, the discussion draft limited FCC authority further by requiring that potential merger conditions be “unique” to the transaction at issue and not present more broadly in industry. Finally, the draft bill added a new provision that would allow two commissioners to block thousands of matters annually from being acted upon by FCC staff, also known as acting under “delegated authority.”

On July 22, 2013, Chairman Walden circulated a revised version of the FCC Process Reform Act of 2013. The revised bill removes or modifies the new provisions from the July 8 discussion draft and several additional provisions from H.R. 3309. First, for economically significant rules, the FCC must still determine that market forces will not obviate the need for regulation, but is not directed to consider changes in technology. The bill still institutes a new requirement for cost-benefit analysis of economically significant rules but exempts the cost-benefit analysis from judicial review. The FCC’s determination on whether market forces will obviate the need for regulation, however, is still subject to challenge in the courts.

Second, the revised bill makes two changes to the provision addressing FCC merger review standards. The draft removes the words “narrowly tailored” to describe the scope of conditions that may be imposed to address merger specific harms. Administrative law experts testified before the Committee that “narrowly tailored” invokes the highest standard of judicial scrutiny, making it nearly impossible for the FCC to ever meet such a standard. Additionally, the draft removes the word “unique” from the new provision. The revised bill retains other limitations on FCC authority to impose conditions, including requiring any condition to be a remedy to a transaction-specific harm and requiring such harm to not be “presented by persons not involved in the transfer or other transaction.”

Third, the revised bill removes the provision allowing a minority of Commissioners to block delegated authority items. The revised bill also extends the deadline by which agency decisions must be published from 7 days to 30 days and makes minor changes in the Sunshine Act reform provision suggested by the National Association of Regulatory Utility Commissioners.

Although the July 22, 2013, discussion draft responds to several issues raised during the Subcommittee’s hearing on the legislation, the current draft does not address the fundamental problems identified by administrative law and FCC experts. Experts testifying at the hearing on this measure explained that the proposed legislation represents a significant departure from the Administrative Procedure Act and institutes a prescriptive set of statutory requirements that

apply only to the FCC. They emphasized that if enacted into law, this measure would significantly frustrate agency action.

II. THE FEDERAL COMMUNICATIONS COMMISSION CONSOLIDATED REPORTING ACT OF 2013

On July 8, 2013, Chairman Walden circulated a discussion draft of the Federal Communications Commission Consolidated Reporting Act of 2013. This bill would consolidate eight statutorily mandated FCC reports into a single comprehensive report on communications marketplace competition. It would further eliminate twelve outdated reports from the Communications Act. The legislation is identical to the text of H.R. 3310 from the 112th Congress, which passed the House by a voice vote on May 30, 2012.